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The Newhall Land and Farming Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,)	Case No. 07-CV-2380 (JM AJB)
)	
Plaintiff,)	THE NEWHALL LAND AND
)	FARMING COMPANY'S MOTION
v.)	TO INTERVENE AS REAL PARTY-
)	INTERVENOR
UNITED STATES FISH AND WILDLIFE)	
SERVICE and DIRK KEMPTHORNE,)	Assignment:
Secretary of the Interior)	The Honorable Jeffrey T. Miller
)	
Defendants.)	
)	

Date: April 25, 2008
Time: 1:30 p.m.
Place: Courtroom 16

1 For the reasons set forth below and in the accompanying memorandum of points and
2 authorities, The Newhall Land and Farming Company ("Newhall") moves to intervene in the
3 above-captioned action as a real party in interest, pursuant to Rule 24 of the Federal Rules of Civil
4 Procedure, and to file the attached answer to Plaintiff's Complaint for Injunctive and Declaratory
5 Relief. Newhall hereby notifies this Court that the parties have met and conferred and that there is
6 no opposition to the granting of the motion as described below, and submits the following in
7 support of the motion:
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9 1. Plaintiff filed a complaint in the captioned action on December 19, 2007, asserting
10 violations of the Endangered Species Act, 16 U.S.C. §§1531-1599 ("ESA"). Specifically, plaintiff
11 alleges that the Secretary of the Interior ("Secretary") and the United States Fish and Wildlife
12 Service ("FWS") "fail[ed] to issue a legally sufficient designation of 'critical habitat' for the arroyo
13 toad (*Bufo californicus*)" in the rule published in the Federal Register on April 13, 2005.
14 (Complaint, p.1 at ¶1.) The complaint further alleges that the final rule was tainted by certain,
15 potentially improper actions of then-Deputy Assistant Secretary for FWS, Julie MacDonald. The
16 complaint requests that the Court: (1) declare that the statute was violated; (2) issue an injunction
17 requiring that FWS adopt a new rule; and (3) invalidate the final rule designating the critical
18 habitat of the arroyo toad (50 C.F.R. §402.02), with an order that the Secretary vacate and set
19 aside the rule, and promulgate a new rule correcting the alleged errors. (Complaint, p. 13.) In
20 addition, the complaint seeks interim injunctive relief. Specifically, the complaint requests that
21 the Court set aside the final rule on arroyo toad critical habitat, issued on April 13, 2005, and, on
22 an interim basis, replace it with the draft rule issued on April 28, 2004. This "interim" rule would
23 remain in effect until FWS prepares and adopts a new rule designating the arroyo toad critical
24 habitat. In the meantime, the complaint asks that the Court prohibit the federal defendants from
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1 issuing biological opinions on incidental take permits relating to properties located within
2 potential critical habitat areas.

3 2. Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as of
4 right when a statute of the United States confers an unconditional right to intervene or when the
5 applicant claims an interest in the subject matter of the action which may be affected. Newhall
6 meets the requirements of Rule 24(a) because Newhall owns property located in Unit 6, Subunit B
7 ("Unit 6b"), of the arroyo toad critical habitat designation, as proposed in the *draft* rule published
8 on April 28, 2004. However, in the *final* rule published on April 13, 2005, Unit 6b was excluded
9 from the critical habitat designation due to: (1) economic considerations under Section 4(b)(2) of
10 the ESA; and (2) FWS' determination that habitat conservation plans and other conservation
11 measures provided adequate protection of the species in this area. The complaint, however, seeks
12 to invalidate the final rule and replace it, in the interim, with the draft rule dated April 28, 2004. If
13 this were to happen, Newhall's property would be deemed "interim" critical habitat. In addition,
14 the complaint requests that the Court prohibit the federal defendants from issuing any biological
15 opinions or incidental take permits until the new critical habitat rule is adopted in final form. Such
16 a prohibition would dramatically and adversely affect Newhall's current plans to develop its
17 property in Unit 6b. Therefore, Newhall has a significant, protectable property interest related to
18 the subject of this action. Furthermore, Newhall's interest is more definite and narrow than those
19 of the public at large.

20 3. Rule 24(b) also provides for permissive intervention when an applicant's claim or
21 defense and the main action have common questions of law or fact. The facts set forth in
22 paragraph 2, above, demonstrate that Newhall's interest in defending against plaintiff's claims is
23 rooted in common questions of fact with respect to the property that will be designated as arroyo
24 toad critical habitat. Fed. R. Civ.P.24(b) provides that where, as here, a timely application poses
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1 no threat of prejudice to the present parties and involves, as here, legal and factual questions that
2 substantially overlap with those raised by the initial parties, intervention should be granted.
3 Therefore, the requirements for permissive intervention have been met as well.

4 4. In addition, Newhall's proposed intervention is timely. Newhall became aware of
5 this lawsuit soon after the filing of the initial complaint. Newhall then promptly investigated the
6 allegations raised and notified the parties in February 2008 that it was pursuing projects that might
7 be affected by this action, and that it would seek to intervene; and all parties, through their
8 counsel, have stated that they were *not* opposed to Newhall's intervention. (See Affidavit of David
9 Hubbard, ¶¶2-3.) Additionally, based on the early stage of the case, the parties will not be
10 prejudiced by this intervention request.
11

12 5. Further, Newhall cannot rely upon the federal defendants to safeguard its interests
13 in this action. The Secretary and FWS serve interests different from those of Newhall; and,
14 therefore, they will employ strategies and arguments that may diverge significantly from those
15 necessary to protect Newhall's property interests. Moreover, the Secretary and FWS do not have
16 the requisite familiarity with Newhall's interests that would allow them to litigate on Newhall's
17 behalf. The only way for Newhall to ensure its interests are protected is to intervene.
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19 6. Pursuant to Rule 24(c) of the Federal Rules of Civil Procedure, filed concurrently
20 with this motion is Newhall's proposed answer to plaintiff's Complaint for Injunctive and
21 Declaratory Relief.
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23 7. In its order dated February 26, 2008, the Court set an Early Neutral Evaluation
24 ("ENE") conference for March 26, 2008. In compliance with that order, Newhall's settlement
25 brief is filed concurrently with this motion, which meets the March 19, 2008 deadline set by the
26 order. During the ENE conference, Newhall will be prepared to discuss the scheduling of the
27 Federal Rule of Civil Procedure 26(f) conference, and set the dates of initial disclosures and
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1 lodging of the discovery plan, as required under the Federal Rule of Civil Procedure and local
2 court rules.

3 Accordingly, Newhall respectfully requests that the Court grant this motion to intervene
4 and direct the Clerk of the Court to file the attached Answer. A proposed Order is attached to this
5 motion.

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7 March 19, 2008

Respectfully submitted,

8 David P Hubbard
9 Mark J. Dillon
10 Rachel C. Cook
11 Gatzke Dillon & Ballance LLP

12 Attorney for Applicant for Intervention, The Newhall
13 Land and Farming Company

14 By: /s/ David P. Hubbard
15 David P. Hubbard
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